

CERTIFIED FOR PUBLICATION  
COURT OF APPEAL - FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

In re R. R., a Minor,  
  
on  
  
Habeas Corpus.

---

D043317  
  
(San Diego County  
Super. Ct. No. J514274)

Petition for writ of habeas corpus, Susan Huguenor, Judge. Petition granted.

Appellate Defenders, Inc. and Robert Wayne Gehring, under appointment by the Court of Appeal, for Petitioner R. R.

Appellate Defenders, Inc. and Donna Kaiser, under appointment by the Court of Appeal, for Petitioner Alisha R.

No appearance for Respondent.

John J. Sansone, County Counsel, Susan Strom, Chief Deputy County Counsel, and Debra K. Barriger, Deputy County Counsel, for Real Party in Interest San Diego County Health and Human Services Agency.

R. R., a dependent of the juvenile court, seeks a writ of habeas corpus, contending the court failed to terminate the parental rights of his conclusively presumed father James R. before ordering adoption as R.'s permanent plan. We conclude the selection of

adoption as R.'s permanent plan cannot be implemented without terminating James's parental rights. Accordingly, we grant the petition.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

R. was born in December 1997 during the marriage of Alisha and James R. James's name appeared on R.'s birth certificate and the parents claimed James was R.'s father. In December 2001 R. became a dependent of the juvenile court based on findings Alisha and James had a history of criminal convictions and substance abuse, and Alisha failed to recognize R.'s caretaker could not meet his needs. The court found James was R.'s presumed father.

Alisha and James did not comply with their service plans and R. was placed in foster care. In August 2002 a paternity test excluded James as R.'s biological father. The court found James was not R.'s father and granted James's requests to be released from his court-ordered reunification plan and have counsel relieved.

Although James initially requested custody of R., he chose to end their relationship after learning he was not R.'s biological father. Subsequent attempts by the San Diego County Health and Human Services Agency (Agency) to locate James were unsuccessful. Agency's efforts to identify and locate R.'s biological father were also unsuccessful.

---

<sup>1</sup> The facts and procedure are taken from the record on appeal in *In re R. R.*, D042664, of which we take judicial notice. (Evid. Code, §§ 452, subd. (d), 459.)

At a contested selection and implementation hearing under Welfare and Institutions Code<sup>2</sup> section 366.26, the court found R.'s father was John Doe. The court further found R. was adoptable and none of the exceptions to adoption in section 366.26, subdivision (c)(1) applied. The court terminated the parental rights of Alisha and John Doe and referred R. for adoptive placement.

### DISCUSSION

Under Family Code section 7540, "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>3</sup> In the absence of a request for blood tests challenging paternity within two years of the child's birth, the presumption is conclusive. (Fam. Code, § 7541; *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1444.)

Here, the record shows James is the conclusively presumed father of R. R. was born during the marriage of Alisha and James and there was no challenge to James's paternity during the next two years. Indeed, the juvenile court expressly found James was R.'s presumed father. Once James's presumed father status was

---

<sup>2</sup> Statutory references are to the Welfare and Institutions Code unless otherwise specified.

<sup>3</sup> The conclusive presumption of paternity in Family Code section 7540 has been judicially construed to mean the husband and wife were cohabiting at the time of conception rather than at the time of the child's birth. (*Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1203.) Nevertheless, under the rebuttable presumption of Family Code section 7611, subdivision (a), a man is presumed to be the father of a child if he and the child's mother are or have been married to each other and the child is born during the marriage.

established, he was entitled to custody of R. and to reunification services. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596, citing *In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449, 451.) He was also entitled to notice of the selection and implementation hearing at which parental rights may be terminated. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 448.) Although James was later excluded as R.'s *biological* father and chose not to participate further in the reunification process, he remained a presumed father. In the dependency context, presumed father status is not rebutted or negated by evidence someone else is the biological father. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 804; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 823, fn. 3 [man may be presumed father even if paternity is legally disproved].) Thus, contrary to Agency's position, James was R.'s father at the time of the section 366.26 selection and implementation hearing.

The court must terminate the rights of both parents under section 366.26 in order to free a dependent child for adoption. (Cal. Rules of Court, rule 1463(a) and (g).) Here, R.'s adoption can proceed only if James's parental rights are terminated under section 366.26 or he otherwise consents. Thus, the court erred by referring R. for adoptive placement after terminating Alisha's parental rights but leaving intact James's

parental rights.<sup>4</sup> The court's declaration of John Doe as R.'s father and the termination of John Doe's parental rights does not cure the error.

#### DISPOSITION

Let a writ issue directing the juvenile court to enter an order consistent with this opinion terminating James's parental rights after proper notice and opportunity to be heard. The court is directed to provide a copy of the order terminating James's parental rights to this court on or before July 2, 2004. This opinion is final immediately as to this court. (Cal. Rules of Court, rule 24(b)(3).)

CERTIFIED FOR PUBLICATION

---

McCONNELL, P. J.

WE CONCUR:

---

HUFFMAN, J.

---

NARES, J.

---

<sup>4</sup> Alisha has joined in R.'s petition for writ of habeas corpus, contending if James's parental rights have not been terminated, the termination of her parental rights must be reversed. However, in light of our disposition directing the juvenile court to terminate James's parental rights, Alisha is not entitled to the relief she seeks. We have issued an order staying Alisha's appeal of the judgment terminating her parental rights. (*In re R. R.*, D042664.)